

*United States Court of Appeals
for the Second Circuit*



**APPELLANT'S
BRIEF**

ORIGINAL

76-4125

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- - - - - X

ESTATE OF ANTON L. TRUNK, Deceased,
Clara P. Trunk, Executrix,

Petitioner-Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE,

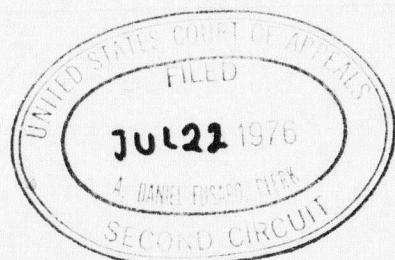
Respondent-Appellee.

- - - - - X

On appeal from the United States Tax Court

B
P/S

BRIEF FOR PETITIONER-APPELLANT



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PRELIMINARY STATEMENT

The Decision appealed from is by Judge William H. Quealy. The citation is 65 T.C. No. 20.

BRIEF OF THE ESTATE OF ANTON L. TRUNK, DECEASED,
CLARA P. TRUNK, EXECUTRIX, PETITIONER-APPELLANT

The Issues Presented on Appeal

1-a. Did the Tax Court erroneously decide that a payment of \$200,000 to decedent's widow pursuant to Paragraph SEVENTH of decedent's Will, may not be claimed by decedent's estate as a marital deduction under Section 2056 of the Internal Revenue Code? *

1-b. In resolving question "1-a", the Court may need to decide whether in construing Paragraph SEVENTH of the decedent's Will, the Tax Court erred in excluding testimony of the witness Treanor and by disregarding an accounting and settlement agreement executed by the parties who had an interest in the trust created by Paragraph SEVENTH of decedent's Will.

2. Did the Tax Court erroneously decide that estate tax attributed to property bequeathed to trusts under Paragraphs SIXTH and SEVENTH of decedent's Will was chargeable to the principal of the trusts rather than to the income?

Statement of the Case

A. Prior Proceedings

This action was commenced by Petition to the United States Tax Court for a redetermination of a deficiency in estate tax as determined by the Commissioner of Internal Revenue in his statutory notice. (A-8-12). The case was heard before Judge Quealy, on March 17, 1975; following which the Tax Court rendered its decision upholding the Commissioner's

*Relevant sections of the law appear in Addendum at pp. 47-51.

determination of a deficiency in estate tax in the amount of \$124,708.91. (A-137-163).

B. Facts

The Marital Deduction Issue

Clara P. Trunk (Petitioner), widow of Anton L. Trunk (decedent), was appointed by the Will as Executrix of decedent's estate. Decedent's Will was probated in Westchester County, State of New York, and Letters Testamentary were granted June 11, 1968. (A-16). Decedent's estate tax return was filed with the District Director of Internal Revenue, Manhattan District, New York. (A-16). Upon audit, the Commissioner determined the value of the gross estate to be \$1,879,004.96 (A-16), debts and expenses of decedent to be \$636,623.51 and the adjusted gross estate to be \$1,242,381.45. (A-10-12, 46). The Commissioner determined that, exclusive of the sum of \$200,000 paid to Petitioner pursuant to Paragraph SEVENTH of the Will, the marital deduction with respect to bequests to Petitioner allowable under Section 2056 of the Internal Revenue Code amounted to \$316,093.14. (A-17). Petitioner contends that the marital deduction should be increased by \$200,000 which is payable to Petitioner as in the second unnumbered paragraph of Paragraph SEVENTH of the Will.

In addition to the cash, stocks and other property, bequeathed outright to Petitioner by decedent's Will which the Commissioner included in the marital deduction, Petitioner was also bequeathed a life interest in the income from the three Trusts created under Paragraphs SIXTH, SEVENTH and EIGHTH of the Will. (A-52-54, 61-62, 67-68). TRUST ONE, created by

Paragraph SIXTH of the Will, consisted of improved real estate subject to a lease (A-51-52) having a gross value of \$372,000 subject to a mortgage of \$135,000. (A-17). Paragraph SIXTH provides that Petitioner is to receive \$10,000 per annum out of the first \$18,400 of the annual net income earned by TRUST ONE and all of the Trust's annual net income in excess of \$18,400. (A-51-53). TRUST TWO created in Paragraph SEVENTH of the Will, consisted of an undivided fifty percent interest in improved realty (A-61) having a gross value of \$750,000 subject to a mortgage of \$247,765.63. (A-18). Paragraph SEVENTH provides that Petitioner is the life beneficiary of the annual net income of TRUST TWO. (A-61-62). TRUST THREE, created in Paragraph EIGHTH of the Will, consisted of an installment contract, payable without interest (A-66-7) valued at \$140,634. (A-35). Petitioner is the life beneficiary of the annual net installments of principal due under the contract as they accrue to this Trust. (A-67).

Petitioner contends that Paragraph SEVENTH contains language which the decedent intended as an elective bequest in the sum of \$200,000 to Petitioner and which, therefore, qualifies for the marital deduction. Specifically, Petitioner points to the second and third unnumbered paragraphs of Paragraph SEVENTH which contain the following unusual instructions to the Trustee of the Trust:

"In the event my TRUSTEES shall certify in writing that it is requisite, necessary or desirable to borrow a sum of money, my said TRUSTEES are hereby authorized and empowered to do so up to, but not in excess of, the sum of \$200,000.00

and, for such purpose, to mortgage my aforesaid interest in the property constituting the corpus of this trust and to make, issue and deliver such bond or note and mortgage and any other instruments as may be proper and necessary. Said sum so borrowed shall be turned over, in whole or in part, to my wife, CLARA POEY TRUNK, if so requested by her in writing and/or used, in whole or in part, to pay and discharge any Federal or New York State Estate or Inheritance Taxes, under any of the provisions of this, my Will.

I hereby authorize and empower my TRUSTEES to sell the property constituting the principal of this trust when and if in their sound judgment it is expedient, desirable and advantageous to do so and they shall so certify in writing and I request that my TRUSTEES, if they shall decide to sell the trust property, advise the co-owners of the property of their decision." (A-62-63).

Harold J. Treanor who had been decedent's attorney for approximately 36 years was nominated by decedent as Trustee for TRUST TWO and Mr. Treanor thereafter qualified as the sole Trustee under that Trust. (A-85, A-94). Although the Will was typed in Mr. Treanor's office, drafting was directed by decedent, who insisted on using the specific words appearing in the above cited section of the Will. (A-86,91). Shortly after the Will was executed, decedent told Mr. Treanor that the above cited language meant that if Petitioner asked for \$200,000 she is to receive that amount either out of the proceeds of money borrowed by the Trust or out of

the proceeds of a sale of the property bequeathed to the Trust. (A-90, 95-96, 98).

By letter dated July 21, 1971, addressed to Mr. Treanor in his capacity as Trustee of TRUST TWO, Petitioner demanded payment of \$200,000 pursuant to Paragraph SEVENTH of the Will (A-81) and that sum was paid to her or for her benefit during August 1971. (A-82, 83, 84, 102).

In October 1974, an Accounting in respect of TRUST TWO for the period June 11, 1968 to April 30, 1973, was filed in the Surrogate's Court for Westchester County. (A-92-94, 105-136). In Schedule "D" of the Accounting, the payment to Petitioner in the amount of \$200,000 is listed as a distribution of the principal of the Trust. (A-120). The Accounting also shows that Petitioner was the only distributee of income for the period of the Accounting (A-121) and that as of April 30, 1973, \$46,581 of Trust income had not yet been distributed. (A-124). Attached to the Accounting was a Settlement Agreement executed by all of the beneficiaries of TRUST TWO, including the remaindermen, Presbyterian Home for Aged Women in the City of New York. (A-128-136). In the Agreement, the sum of \$200,000 paid to Petitioner was specifically labeled as an "elective marital bequest" conferred upon Petitioner (A-129) and the payment of the \$200,000 bequest was shown as a distribution of principal and cross referenced to the Accounting. (A-131). The Settlement Agreement was signed by all of the beneficiaries of TRUST TWO, each of whom had an adverse interest to Petitioner.

At the Tax Court hearing, the Commissioner objected under the parol evidence rule to testimony offered with respect to the \$200,000

payment made to Petitioner pursuant to Paragraph SEVENTH. Judge Quealy ruled that the language of the second unnumbered paragraph of Paragraph SEVENTH under the terms of which Mr. Treanor had disbursed the \$200,000 to Petitioner was ambiguous and, therefore, permitted Petitioner to continue with testimony to assist in the construction of the language of that paragraph. (A-90). Accordingly, Mr. Treanor, Trustee of the Trust and decedent's long-time attorney, was permitted to testify as to his relationship with decedent, the drafting of the Will and conversations with decedent regarding the Will. (A-90). Mr. Treanor testified that decedent insisted that he follow decedent's directions as to form and language in drafting the Will and that decedent overruled Mr. Treanor's comments with respect to the form and the language. (A-86, 91). Mr. Treanor also testified that he understood the language of the second unnumbered paragraph of Paragraph SEVENTH of the Will to constitute an elective bequest of \$200,000 to Petitioner and that Petitioner's request for payment was a mandate to him. It was his understanding that upon receipt of such a request from Petitioner he would have to raise the \$200,000 by having the Trust borrow money as provided in the second unnumbered paragraph or sell property, which power he was given in the third unnumbered paragraph. (A-95-96).

Mr. Treanor then testified that he had a conversation with decedent in January or February 1968 with respect to the Will which had been executed in December 1967, and that the conversation related to the \$200,000 payment referred to in Paragraph SEVENTH of the Will. (A-96). The Court refused to permit any further testimony with respect to that conversation on the grounds that the testimony was too vague, self-serving, and

the time, place and event had not been sufficiently specified. (A-97). However, the Court did permit an offer of proof to the effect that decedent told Mr. Treanor that the language in the second unnumbered paragraph of Paragraph SEVENTH of the Will beginning, "In the event my trustees..." (A-62-63) was merely a direction to the Trustees as to the source of the money to be used to make the payment of \$200,000 to Petitioner if she requested such payment and that the third unnumbered paragraph of Paragraph SEVENTH suggested another source for the money. The offer of proof included testimony by Mr. Treanor that decedent told him that he meant for Petitioner, under all circumstances, to be entitled to the sum of \$200,000 upon her request and without regard to the wishes of the Trustee of the Trust or of any other beneficiary. (A-98-100). In its decision the Tax Court ruled that Mr. Treanor's testimony was inadmissible under the Parol Evidence rule (A-156-157) and gave no weight to the Accounting, (A-156) and accordingly held that there was no evidence to support Petitioner's contention as to the marital deduction. (A-157-158).

Value of Charitable Bequests

The remainder interest of each of TRUSTS ONE and THREE was bequeathed to St. John's Episcopal Church of Larchmont, New York (A-17, A-146), while the remainder interest in TRUST TWO was bequeathed to the Presbyterian Home for Aged Women in the City of New York. (A-18). Both of those institutions qualify for the charitable deduction. (A-17, 18). The remainder interest in TRUST ONE was valued at .3489 of the net value of the property given to the Trust. (A-17). The value of the remainder interest in TRUST TWO was valued at .3525 of the net value of the property in the

Trust. (A-18). The remainder interest in TRUST THREE was valued at \$1,555.00. (A-45). These charitable bequests were claimed on the estate return as charitable deductions in the amount of \$233,385.83 (A-45) but in his notice of deficiency, the Commissioner reduced the allowance by \$22,379.31. (A-10). The Commissioner contends that the pro rata share of the Federal and State Estate Tax attributable to the property bequeathed to the three Trusts was to be paid out of the principal of the Trusts thereby reducing the value of the charitable remainder interest, rather than out of the income which would only reduce the value of the life beneficiary's interest.

The Will contained the following instructions with respect to the payment of the estate taxes:

TRUST NUMBER ONE

SIXTH: "...I direct my said Trustees to collect the entire income...and apply and pay over said income as follows:

(a) To the payment and discharge of any and all liabilities and obligations arising out of or connected with the operation and maintenance of the trust property including, but not limited to, the payment of interest and amortization of mortgages, the discharge and satisfaction of mortgages, the payment of taxes and water charges, if any, as well as the payment of administration, legal expenses and Federal and State Estate Taxes and Income Taxes." (A-52).

TRUST NUMBER TWO

SEVENTH: "...I direct my said trustees to collect my share of the income therefrom and to apply and pay over the said income as follows:

(a) To the payment and discharge of any and all liabilities and obligations arising out of or connected with the operation and maintenance of the trust property including, but not limited to, the payment of interest and amortization of mortgages, the discharge and satisfaction of mortgages, the payment of taxes and water charges, if any, as well as the payment of administration, legal expenses and Federal and State Estate Taxes and Income Taxes.
(A-61-62).

TRUST NUMBER THREE

EIGHTH: "...I direct my said trustees to collect all such principal and apply and pay the same to St. John's Episcopal Church of Larchmont, New York except as hereinafter provided in subdivisions (a), (b) and (c) hereof:

(a) To the payment and discharge of any and all liabilities and obligations arising out of or connected with the operation and maintenance of the trust including, but not limited to, Federal and State Estate Taxes and Income Taxes, if any."
(A-67).

ARGUMENT

The Tax Court's decision on the issue of the marital deduction was based upon its own interpretation of decedent's Will without reference to evidence available to assist the Court in construing the ambiguous language of the Will. The Tax Court's failure to consider the extrinsic evidence consisting of Mr. Treanor's testimony as to conversations with decedent in which decedent explained the meaning of the Will and the Tax Court's refusal to give any weight to an accounting and settlement with adverse parties was erroneous under New York law. It is respectfully submitted that the available evidence should have been admitted and relied

upon to construe the ambiguous language in the Will as a bequest which qualified for the marital deduction.

It is further submitted that the Tax Court committed error in concluding that the directions in Paragraphs SIXTH and SEVENTH of the Will with respect to the apportionment of the estate taxes were insufficiently clear to be given effect under New York Law. The Tax Court's error was based upon a misinterpretation of the governing law of the State of New York.

POINT I

PARAGRAPH SEVENTH OF THE WILL
CONTAINS A BEQUEST TO PETITIONER
IN THE SUM OF \$200,000.00 WHICH
QUALIFIED FOR THE MARITAL DEDUCTION

A. Parol evidence consisting of decedent's statements relevant to the construction of his Will is admissible. Where there exists an ambiguity in a Will, New York Law provides that parol evidence is admissible to show the true intent of the testator. Except for mere declarations of intention not contained in the Will, even statements by the testator are admissible to show his true intent. Paragraph SEVENTH of the Will is ambiguous as to the disposition or use of the sum of \$200,000.00 referred to in its second unnumbered paragraph, as demonstrated by the three interpretations of the second and third unnumbered paragraphs of Paragraph SEVENTH proffered at the Tax Court hearing held on March 17, 1975. The Court suggested that the language indicated the Trustee's right to make advancements of income to Clara Poey Trunk, decedent's widow. (A-87-88). In its opinion filed November 3, 1975, the Court stated that the language merely provided a source of funds to pay estate taxes or the bequests to

decedent's wife otherwise provided for in the Will. (A-155-156). Respondent argued that the language only permitted the money to be used to pay estate taxes. (A-153). Petitioner contended that the language amounted to a discretionary elective bequest which, under New York law, constituted a power of appointment in the widow. (A-95).

The Court ruled at the hearing (A-90) and in its opinion (A-156) that the language of the pertinent paragraphs was ambiguous and that extrinsic evidence of facts and circumstances relevant to the interpretation of the Will would be admitted to construe these paragraphs. Such parol evidence was thereupon offered by Petitioner through the testimony of Harold J. Treanor, decedent's attorney, and through the content of an Accounting and a Settlement Agreement executed by the parties interested as beneficiaries of the Trust created by Paragraph SEVENTH of decedent's Will.

B. Court refused to take part of Treanor's testimony, which was an error.

Harold J. Treanor testified that he had been employed as attorney for the late Mr. Trunk for about 36 years at the time the instant Will was executed. Mr. Treanor said that although he drafted the Will, the late Mr. Trunk directed him with regard to the language and form of the Will. (A-86, 87). Mr. Treanor related a conversation which he had with Mr. Trunk concerning the instant Will (A-86-87) in which decedent impressed upon Treanor that the second unnumbered paragraph of Paragraph SEVENTH of the Will was an elective mandatory bequest to Petitioner of \$200,000. (A-95). In the course of the testimony, Mr. Treanor explained that Mr. Trunk was a man of strong mind

who had fixed opinions on many subjects, including how a Will should be written, and had threatened to fire him if he refused to draw the Will in the manner desired by Mr. Trunk. (A-91). As a result, the clauses of Paragraph SEVENTH of the Will referred to above conform to the exact language demanded by Mr. Trunk, although Mr. Treanor would have used different language had he been given full reign in writing the Will. (A-86). However, Mr. Treanor testified that he understood from this conversation, which occurred some two months after the Will had been signed, that it was Mr. Trunk's intent by that language to absolutely and in all events vest his widow with a general power of appointment to elect to take up to \$200,000 from the principal of TRUST TWO. (A-95-96). Since decedent nominated Treanor as Trustee of TRUST TWO, this instruction and Treanor's understanding is particularly significant.

The Court refused to hear additional testimony from Mr. Treanor. Petitioner made an offer of proof of the conversation between Mr. Treanor and decedent which took place in January or February 1968, wherein decedent insisted on retaining the exact language contained in the pertinent paragraph of the Will, and in justification, explained what he understood the language to mean. Decedent also stated to Mr. Treanor that he put the residuary clause, of which Petitioner is sole beneficiary, as Paragraph THIRD of the Will rather than last because providing for Petitioner was uppermost in his mind. Further, decedent said that to insure adequate provision for Petitioner in the event the residuary was insufficient, Paragraph SEVENTH of the Will included the paragraph beginning on p. 11 (A-62) of the Will

with the words: "In the event my Trustees..." (referred to herein as SECOND unnumbered paragraph) and that he thought the language meant that Petitioner would have, in addition to her life estate, a power of appointment to elect to take up to \$200,000 from the principal of the Trust and directed the Trustees as to how they could obtain the money. (A-98-100).

In its opinion, the Court ruled that the proffered part of Mr. Treanor's testimony, as well as the testimony of the above mentioned conversation which Mr. Treanor actually gave at the hearing, was inadmissible because its acceptance would violate the parol evidence rule, (A-157) although at the hearing the Court had first ruled on the basis that the witness was not sufficiently exact as to the date on which the conversation took place. (A-97).

C. The Tax Court's first reason for exclusion was erroneous. The witness, Mr. Treanor, placed the conversation with decedent in January or February 1968. (A-96). At the March 17th hearing, the Tax Court claimed that Mr. Treanor did not state precisely enough the exact date of said conversation and, therefore, Mr. Treanor was not permitted to testify as to the content of said conversation. Petitioner submits that Mr. Treanor's identification of the time of the conversation was sufficient. The exact day within the two month span on which the conversation occurred is immaterial for its proper evidentiary evaluation by the Court in relation to the other facts and circumstances relevant to the construction of decedent's Will. Moreover, the conversation took place over seven years prior to the trial and it was thus not unreasonable that a more precise date was not recalled. Therefore, this

reason given by the Tax Court for the exclusion of Mr. Treanor's testimony is insufficient, and constitutes reversible error.

D. The Tax Court's second reason for exclusion was erroneous. The Tax Court stated in its opinion an additional reason for the exclusion of Mr. Treanor's testimony -- that the testimony violated the parol evidence rule for Wills, and so was inadmissible. In support of its conclusion, the Tax Court cited Estate of Edward N. Opal, 54 TC 154, 160 (1970), aff'd 450 F. 2d 1085 (2nd Cir., 1971). Petitioner submits that the Tax Court's determination in the instant case was incorrect because it improperly applied the holding of Opal and the leading New York case on the issue, In re Smith's Will, 254 N.Y. 283, 172 N.E. 499 (1930), followed by the Opal court.

Opal was clearly correct on its facts in excluding testimony of the Testator's statements. It is a fundamental principle in the construction of Wills that parol evidence may be admitted to clarify the language of a Will but may never be used to change, contradict, add to or vary the written words. Brown v. Quintard, 177 N.Y. 75, 69 N.E. 225 (1903). In Opal, the parol evidence which Petitioner sought unsuccessfully to introduce contradicted the clear language of the Will. Thus in Opal, the taxpayer could not overcome two problems -- the Will was clear and not ambiguous, and the proffered evidence would contradict the plain language of the Will. But it bears noting that in Smith, testimony consisting of the Testatrix's statements was admitted in order to construe her Will, since those statements clarified the ambiguous language contained in her Will. Petitioner submits that the relevant facts and circumstances of the instant case are

closely analogous to those of the Smith case and wholly distinguishable from those of the Opal case. Therefore, Petitioner contends that Mr. Treanor's testimony was admissible on the issue of the construction of decedent's Will.

Opal concerned the marital deduction consequences of a joint Will executed by the decedent and his wife. The Will expressly stated that the dispositions therein were irrevocable and that each party's dispositions were in consideration for those of the other party. The dispositions by both parties were "reciprocal"; each party gave his entire estate to the other party, and upon the death of the latter, the survivor's entire estate would pass to their son. Such a joint Will, if it is founded upon a contract between the parties, is commonly called a joint and mutual Will. Under New York law, the effect of the contractual obligations undertaken by the parties to a joint and mutual Will is to make the surviving party a Trustee, on behalf of the ultimate remainderman under such Will, over the property which was bequeathed to him by the other party to the joint and mutual Will. As a result of the New York laws, the surviving party's interest in such property bequeathed to him is essentially limited to a life estate of a character which does not qualify for the marital deduction. Thus the issue before the Court was whether the joint Will expressed the contractual obligations of a joint and mutual Will or whether the intention expressed in the joint Will was to bequeath a fee simple interest in each party's property to the survivor, free from the contractual obligations of a joint and mutual Will.

According to the Opal Court, the parol evidence which the Petitioner in Opal attempted to introduce fell far short of raising any doubt in the Court's mind as to the decedent's intent expressed in the language of the joint Will. The Opal Court reasoned that the language of the Will was clear and unambiguous in expressing the contractual agreement of a joint and mutual Will, and that any other interpretation of the words of the Will would be entirely contradictory to the prominent contractual words contained therein. Since the parol evidence proffered by Petitioner in Opal completely negated the existence of a contract of a joint and mutual Will, such evidence would not clarify the joint Will in question under any circumstances, but could only contradict the written words of the joint Will. In essence, the language of the joint Will in Opal was not susceptible to a meaning expressing the decedent's alleged intent disclosed by the parol evidence proffered by Petitioner in Opal. Certainly, in such circumstances as were present in Opal, parol evidence consisting of decedent's statements as to the nature of the disposition which he desired to make to his wife was inadmissible under the mandate of Smith, as such statements were express declarations of intention not contained in the joint Will in question.

It is apparent that the Opal case is inapposite to the instant case. The language of the Opal Will was clear; however, the relevant part of decedent's Will is expressed in ambiguous language. The lack of clarity in the pertinent paragraphs of decedent's Will was exhibited as Petitioner, respondent, and the Court each suggested different interpretations of language. Moreover, the language of decedent's Will is susceptible of

expressing the intention which Petitioner's proffered evidence disclosed as the true intent of decedent, a fact which respondent implicitly acknowledges by asserting that a valid bequest was made by decedent and only quibbling with Petitioner about the purposes for which the donee could use the proceeds. (See A-90 and Brief for Respondent filed with Tax Court pp. 9, 14, 15). But in Opal, the language of the joint Will was not susceptible of expressing the intent of the decedent thus disclosed by the parol evidence proffered. Necessarily, the instant case is 180 degrees away from the Opal case. The fundamental point is that the proffered testimony of the instant Petitioner serves to clarify the pertinent language of the instant Will, not to completely negate and contradict the written words, which was the ineffectual purpose of the inadmissible evidence in Opal. Therefore, the Tax Court in the instant case is incorrect in relying upon Opal in order to rule that the testimony of Mr. Treanor proffered by Petitioner is inadmissible. On the contrary, the Smith case clearly shows that the proffered testimony is admissible on the issue of the construction of decedent's Will.

Matter of Smith, supra, which was expressly followed in Estate of Edward N. Opal, supra, is the leading New York case on the subject of the parol evidence rule applicable to Wills. As will be shown below, the facts of the Smith case are closely analogous to the pertinent ones of the instant case, and the parol evidence consisting of the decedent's statements in Smith was very similar to the proffered testimony of Mr. Treanor. In Smith, the parol evidence was admitted in order to construe the decedent's Will. Petitioner in the instant case submits that under the

Smith case, the proffered testimony of Mr. Treanor is admissible on the issue of the construction of decedent's Will.

In Smith, the decedent executed a Will in Florida in 1924 on a printed form which contained a clause reading "hereby revoking all former Wills by me made". The question before the Court was whether the 1924 Will revoked a prior Will of the Testatrix executed in New York in 1911 which was offered for probate. The Court admitted evidence extrinsic to the 1924 Will, including the facts that the decedent segregated some of her securities from 1909 until 1924 by delivering them to a bank in New York, that she often expressed her intention to maintain this fund in New York separate from her other property, and that she frequently stated her wish that the separate fund maintained in New York be distributed after her death through the New York courts. Such evidence was admitted to show that the 1924 Will revoking "all former Wills by me made" meant all former Wills disposing of properties situated outside New York.

As to the admission of the extrinsic evidence, the Court stated:

"It is the modern rule that 'with the exception of direct statements of intention, no extrinsic fact relevant to any legitimate question arising in the interpretation of writings and admissible under the general rules of evidence' can be shut out Sometimes the rule has been stated with the proviso that extrinsic facts may be shown in cases only 'where the language alone is of doubtful import.' . . . We take this to mean merely that the probable intention of the writer, as indicated by extrinsic facts, may not prevail over the plain meaning of the written word, nor have any force whatever, unless the words incorporated in the writing are susceptible of a meaning which expresses the intent thus disclosed." Matter of Smith's Will, supra at 289. (Emphasis Supplied)

The Court stated the issue was whether the facts extrinsic to the 1924 Will indicated that the plain literal meaning of the language employed in the 1924 Will was not in accord with that which the Testatrix intended. Thereupon, the Court examined all the extrinsic evidence, including the above mentioned statements of the Testatrix as related by witnesses, determined therefrom the true intent of the Testatrix, and ascertained that the language of the Will possibly could express such true intent. The Court then ruled all the extrinsic evidence offered was admissible and construed the 1924 Will according to the Testatrix's true intent disclosed by the extrinsic evidence.

The Court in Smith stated that it was not dealing with a case where there was proposed a violation of the above rule that express declarations of intention not contained in a Will may not be shown, except in cases of equivocation as to subject or object of a gift. It is apparent that the Court in Smith understood the above rule to mean that, although a Testator used inartful and ambiguous language, where the words of the Will are adequate to express the true intent of the Testator gathered from all the extrinsic evidence, such extrinsic facts are admissible to prove the Testator's true intent, and his Will must be construed accordingly. In Smith, the testatrix's statements were not mere declarations of her unfulfilled intention to do something and inadmissible as such, because such intent was not expressed by the text of her Will; on the contrary, her true intent was expressed ambiguously in the Will. Thus her statements to witnesses expressing her intention with respect to her property situated in New York were relevant, admissible evidence on the issue of the construction of her Will.

The instant case presents an analogous situation to the Smith case. Petitioner sought to introduce, through Mr. Treanor's proffered testimony, extrinsic evidence of facts and circumstances relevant to the interpretation of the Will. A part of such extrinsic evidence was the decedent's statements wherein he set forth to Mr. Treanor the meaning, as he perceived it to be and meant it to be understood, of the language of the pertinent paragraphs of a Will which he had to all intents and purposes written himself and that his utmost concern was to provide for his wife. Analogous concerns were expressed in decedent's statements in Smith to show analogous distortions in the use of certain words in the decedent's Will from common draftsmanship. Mr. Trunk's Will used ambiguous and inartful language to express the Testator's intent, just as in the Smith case. Nonetheless, it was conceivable in Smith to understand the pertinent clause in the Will to express the true intent of the Testatrix in that by revoking "all former Wills" Mrs. Smith referred only to prior Wills disposing of property situated outside New York. So it is equally possible that the simple words of the instant Will beginning "In the event..." give the decedent's wife the power to appoint up to \$200,000 of the Trust principal to herself. Moreover, both respondent and Petitioner agree that the language of Paragraph SEVENTH expressed the Testator's intent to give his wife an amount of money not exceeding \$200,000, although the parties differ as to the other terms of the testamentary disposition. Therefore, in the instant case, as in Smith, where the language of a Will is ambiguous and admits of the construction which the extrinsic evidence seeks to place upon it, such extrinsic evidence is admissible even if it consists of decedent's statements concerning the

bequests in his Will. The instant testimony does not contain a bare statement of decedent's intent -- that intent was expressed in his Will in language of ambiguous import, but in language which was susceptible to an interpretation expressing the true intent of decedent disclosed by the proffered testimony of Mr. Treanor and the Accounting and Settlement Agreement. Therefore, the proffered testimony ought not to be excluded under the New York parol evidence rule.

E. Meaning of "Direct Statements of Intention". The Smith Court announced a very liberal rule for the admission of extrinsic evidence in the construction of Wills. As shorthand for the full holding of the Smith case, subsequent New York cases often focused on the statement in Smith that "with the exception of direct statements of intention, no extrinsic fact relevant to any legitimate question arising in the interpretation of writings and admissible under the general rules of evidence can be shut out." The phrase "direct statements of intention" was used as a term of art by the Smith Court, yet that Court did not expressly delineate the denotation of the phrase. Consequently, the holding of the Smith case was erroneously applied to the facts of some subsequent cases due to the lower court's misunderstanding of the phrase "direct statements of intention". A clear exposition of the meaning of "direct statements of intention", as used by the Smith Court, was given in In re Blodgett's Estate, 168 Misc. 898, 7 N.Y.S. 2d 364 (Sup. Ct., Erie Cty., 1938).

In Blodgett, the decedent created in her Will certain trusts of which her two children were the only life income beneficiaries. The Trustee was given, by the terms of the testamentary trusts, the power to invade the combined corpus to the extent of \$5,000.00 annually for the benefit of each income beneficiary in order to pay annually to each income beneficiary a maximum sum of income and principal equal to \$15,000.00 whenever the trust income was insufficient to provide such sum. This power of invasion was limited in that the combined corpus was not to be reduced below \$125,000.00. Subsequently, the decedent executed a ~~Codicil~~ to the Will which increased the Trustee's aforementioned power of invasion. The Codicil referred to the aforementioned testamentary trusts and in an ambiguous amendment, gave the Trustee the power to invade the corpus for the benefit of the income beneficiaries to the extent of an additional \$5,000.00 per beneficiary. The issue before the Blodgett Court was whether certain extrinsic evidence was admissible to aid the Court in determining what was the intent of decedent as expressed in the Codicil. The extrinsic evidence consisted of: the decedent's statements to the draftsman of her Will that she had changed her mind, that she desired each of her children to have a yearly income of \$20,000.00 instead of \$15,000.00, and that she wanted to execute a Codicil so providing; and the decedent's statements to her attorney and the latter's advice concerning decedent's

change of mind, and the feasibility of investing the trust corpus, and possibly distributing principal, so as to provide \$20,000.00 annually to each income beneficiary without reducing the trust corpus below \$125,000.00.

The problem was obvious in Blodgett -- Mrs. Blodgett's statements made clear that she desired to amend her Will to assure each of her children a minimum annual income of \$20,000.00 from the testamentary trusts by giving the Trustee the power to invade the corpus to the extent of \$10,000.00 annually whenever the trust income payable to each beneficiary fell below \$20,000.00; however, the Codicil literally only increased the Trustee's power of invasion by \$5,000.00 without increasing the minimum annual income payable to each life beneficiary. It was apparent to the Court in Blodgett that it was faced with the construction of an ambiguous Codicil, as the language of the Codicil was rendered obscure by outside circumstances, consisting of Mrs. Blodgett's extrinsic statements to her attorneys and scrivener, which suggested that a literal interpretation of the Codicil did not accord with Mrs. Blodgett's true intent. Consequently, extrinsic evidence was admissible to clarify the language of Mrs. Blodgett's Codicil.

The Blodgett Court acknowledged that when Mrs. Blodgett told her attorneys and scrivener how she had changed her mind and what she wanted done, she expressed an intention, but under the facts of the case it was not a "direct statement of intention" inadmissible under Smith. As the Blodgett Court explained, a direct statement of intention excludable under

Smith is one indicating only decedent's volition to alter something in his Will, although there are no corresponding written changes made in the Will; but the very same extrinsic evidence is admissible under the Smith case to determine the sense of the words contained in the Will, such as, to interpret the words by which the decedent actually expressed his changed intent in his Codicil. In essence, a "direct statement of intention" under Smith is one which supplies an intent of the Testator disclosed by his oral statements, which intent failed of expression in the language of his Will and Codicils thereto.

Therefore, Mrs. Blodgett's declarations offered into evidence were admissible on the issue of the construction of the Will and were not "direct statements of intention" according to the Blodgett Court because they did not establish an intention incommunicable by the language of the Will and Codicil or contradictory to such language. On the contrary, the parol evidence consisting of Mrs. Blodgett's extrinsic statements aided the Court in discerning the correct meaning which it should ascribe to the language of the Codicil in order to carry out Mrs. Blodgett's true intent.

While the facts of Blodgett are not as directly analogous to those of the instant case as are the facts of the Smith case, their similarity and extension to the instant case is apparent. In Blodgett the language of the Codicil was ambiguous in the light of the proffered testimony of the Testatrix's statements, while in the instant case the language of the Will is ambiguous notwithstanding the extrinsic evidence,

a difference which only makes petitioner's case on the evidence issue stronger and does not render the Blodgett case inapposite. Mrs. Blodgett's statements of her desires as to the life income bequests to her children were made to her scrivener and attorneys and presents an analogous situation to the instant case, wherein decedent's statements of his desires as to his wife's legacy under his Will were made to the Trustee appointed in his Will. Moreover, in both the instant case and in Blodgett, the ambiguous language of the decedent's Will was susceptible to an interpretation expressing the true intent of the decedent as evidenced by the decedent's extrinsic statements which were sought to be introduced in the respective cases. In neither Blodgett nor the instant case were the extrinsic statements of the decedent in direct contradiction to the language of the respective Wills, nor did the language of the respective Wills fail to conceivably express the true intent of decedent disclosed by the proffered extrinsic evidence. Therefore, in neither Blodgett nor the instant case are the proffered declarations of the decedent "direct statements of intention not contained in the Will" which would have been inadmissible evidence pursuant to the holding of the Smith case. Instead, the proffered declarations of Mrs. Blodgett and decedent aid the court in determining the "sense" of the words employed in decedent's Will and Mrs. Blodgett's Codicil, and hence are admissible evidence under the rule of the Smith case.

One further New York case relevant to the admisibility of

Mr. Treanor's testimony should be mentioned - In re Menick's Will, 124 N.Y.S. 2d 573 (Surr. Ct., West. Cty. 1953). Since the Court will decide the case as if it were the pertinent State's Court, the importance of this case lies in its being a judgment of a Westchester County Surrogate's Court. In the ordinary course of events, that is the New York Court which would construe Mr. Trunk's Will in the first instance if one of the beneficiaries thereunder, such as the remainderman of TRUST TWO, had objected to the Accounting and sought to bring a proceeding to construe the pertinent paragraphs of decedent's Will which are in question in the instant case. In Menick, the language of the Will did not clearly express the intent of the Testator and so, the attorney-draftsman's testimony of the Testator's instructions to him as to the dispositions in the Will was admitted into evidence in the action for construction of the Will. It is worth noting that the Menick Court gave an expansive, liberal thrust to the admission of extrinsic evidence under the parol evidence rule. In the light of its brief opinion, it appears that the Menick Court would also find Mr. Treanor's testimony in the instant case to be admissible. ¹

1 It is possible that other Surrogate's Courts in New York take a restrictive approach to the admission of extrinsic evidence of a Testator's statements on the issue of the construction of a Will, inconsistent with the liberal and modern directive of Smith. See e.g., In Re Estate of Frederick, 41 Misc. 2d 759, 246 N.Y.S. 2d 320 (Surr. Ct., N.Y. Cty., 1964), aff'd. 253 N.Y.S. 2d 525. However, the Frederick court, while excluding evidence similar to Mr. Treanor's proffered testimony, accepted other extrinsic evidence and thereupon construed the Will in favor of the party which attempted to introduce the decedent's declarations in evidence. The judgment of the Surrogate's Court in Frederick was affirmed on appeal in a memorandum decision with no opinion. The instant petitioner believes that the exclusion of Mr. Frederick's declarations to the draftsman of his Will was incorrect under the facts of the Frederick case. However, the Appellate Court in Frederick had no opportunity to examine the decision of the Surrogate's Court in Frederick holding that testimony of the decedent's declarations to the draftsman of his Will was inadmissible evidence, since it was a harmless error under the circumstances of that case.

F. The proffered testimony contained material and relevant facts to the issue of the construction of decedent's Will. The instant case is unlike the cases where the Testator instructs the draftsman of his Will as to his intent and thereafter executes the final version of his Will, which carries different terms, which are, however, ambiguous. In the latter cases, evidence of the Testator's statements of intent contained in the instructions to the draftsman is inadmissible because it is irrelevant. Courts may not inquire into the Testator's understanding of the legal implication of words which were selected for him by a draftsman of his Will. Manion v. Peoples Bank of Johnstown, 292 N.Y. 317, 55 N.E. 2d 46 (1944). Such evidence does not serve to interpret the language of the Will and it does not necessarily express the Testator's intent at the moment he signed the Will, for he may have changed subsequently his previous intent to that actually expressed in his Will. In the instant case, on the other hand, the evidence sought to be introduced was the draftsman's testimony of the Testator's own understanding of the words which the Testator chose himself and insisted be placed in his Will, and which were so used. Therefore, the instant proffered evidence is relevant.

It is well established that no magic words need be used to make a gift or give a testamentary power of appointment. As a matter of fact, in New York one may even make a bequest or devise by implication and extrinsic evidence is obviously admitted. In re Birdsell's Will, 271 A.D. 90, 63 N.Y.S. 2d 146 (3rd Dept., 1946), aff'd 296 N.Y. 840 (1947). Therefore, it is not necessary that the Court be convinced that the language of

Paragraph SEVENTH expresses the intent which Petitioner claims is contained therein. It is enough under the Smith case if the Court agrees that the language is merely susceptible to such a construction as Petitioner contends is proper. This sole prerequisite to the admission of relevant evidence, such as the proffered testimony of Mr. Treanor, Petitioner contends was satisfied in the instant case. Therefore, the Tax Court committed error by its exclusion of the proffered testimony on the issue of the construction of decedent's Will.

The exclusion of the proffered testimony of Mr. Treanor was improper, and in this regard prejudiced substantial rights of Petitioner as the Court was deprived of material evidence. If the Court accepts the truthfulness of Mr. Treanor's report of his conversation with decedent, the Court has the best evidence available to construe decedent's Will.

The importance of the proffered testimony in the construction of decedent's Will is enhanced by the fact that aside from the Accounting and Settlement Agreement, to which the Court ascribed no evidentiary weight because it misunderstood the New York statutory provision for inheritance rights of a surviving spouse, (as more fully explained below) there was no extrinsic evidence available to aid the Court in its construction of decedent's Will. "The search for intention is difficult enough without the imposition of undue and obstructive requirements that would confine the Court's investigation to a mere reading of the language before it." In re Fabbri's Will, 2 N.Y. 2d 236, 159 N.Y.S. 2d 184, 190 (1957). That is also the principal rationale for the Smith Court to limit the exclusionary

effect of the parol evidence rule while proclaiming that the more expansive modern evidence rules should be followed. A good example of the modern rule is FRE §803 (3) which states:

"803. The following is not excluded by the hearsay rule, even though the declarant is available as a witness:...

(3) Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will."

It is only when the proponent, citing a Testator's expressed words of intent, or some other extrinsic fact, seeks to add a bequest to the Will where none is even implied by the language, that the parol evidence rule shuts out testimony of the extrinsic facts.

Courts are often cautioned that the refusal to consider extrinsic evidence is virtually an abdication of the Court's duty to construe a Will. In re Fabbri's Will, supra. By the same token, the construction of a Will is not supposed to be an exercise in semantics, but rather a search, aided by extrinsic evidence for the decedent's own intent.

In re Will, supra. The Court did not, as it should have done, place itself in Mr. Trunk's position as far as it could by referring to the extrinsic facts and circumstances proffered in Mr. Treanor's testimony; and from that viewpoint seek the meaning of the pertinent part of Paragraph SEVENTH which was in Mr. Trunk's mind when he executed the Will. Wiseman v. Phipps, 288 N.Y. 311 (1942). The exclusion of Mr. Treanor's testimony made

it virtually impossible to abide by this fundamental rule of construction of Wills. Certainly that prejudiced Petitioner's substantial rights. Therefore, the Court committed error requiring the reversal of its judgment and entitling Petitioner to a new trial.

G. The Accounting and Settlement Agreement, which was executed by parties who were adverse to Mrs. Trunk and could not benefit therefrom, is convincing evidence of Mr. Trunk's intent. In October 1974, the Trustee filed an intermediate Accounting for TRUST TWO on notice to all of the interested parties, including the contingent life beneficiaries and the remainderman of the Trust. In the Accounting, the \$200,000 paid to Petitioner, in August 1971 is clearly denoted in Schedule "D" under the heading "STATEMENT OF DISTRIBUTION OF PRINCIPAL". (A-120). Accordingly, the two contingent life beneficiaries and the remainderman had ample notice of the Trustee's conclusion that the \$200,000 paid to Petitioner represented a distribution of principal.

Obviously, such a distribution would reduce the income to be earned by the Trust and thereby adversely affect the contingent life beneficiaries. It is equally patent that the distribution substantially and adversely affected the interest of the remainderman, as it reduced the Trust principal by more than one-third. Nevertheless, the contingent life beneficiaries and the remainderman agreed to the settlement of the intermediate account and waived all rights and claims which they might have against the Trustee on account of this distribution of \$200,000 to Mrs. Trunk. The knowing waiver by the contingent life beneficiaries and remainderman clearly

appears in Exhibits 8 through 11, where at page 2 of each exhibit the following appears:

"It also appearing by a provision of said Will that an elective marital bequest was conferred on said Clara Poey Trunk whereunder the trustee was directed by the terms of said trust, upon the written request of said Clara Poey Trunk to turn over to Clara Poey Trunk up to, but not in excess of \$200,000 of principal, which sum was duly requested by Clara Poey Trunk and delivered to her from principal by the trustee;"
(A-129-130)

Such an Accounting and Settlement Agreement can be filed with the New York Courts to give rise to a strong presumption that the Trustee acted correctly as to the distributions set forth in the event any of the remainderman or contingent life beneficiaries institute an action to challenge the Trustee's payment to Mrs. Trunk. N.Y. SCPA §2202.

The Tax Court's opinion suggests that the Accounting and Settlement Agreement, in which an absolute disposition from the Trust principal to Petitioner in the amount of \$200,000 is clearly shown, was evidence with absolutely no persuasive force to advance Petitioner's case on the interpretation of decedent's Will. In footnote #3 of the opinion filed November 3, 1975, the Court reasoned that if the remainderman had not agreed to that particular form of a distribution to Petitioner from the Trust, then Petitioner would spring an even larger sum out of decedent's estate corpus by exercising her statutory inheritance rights under EPTL §5-1.1. This reasoning by the Court is erroneous.

Since the instant Will was executed on December 27, 1967, New York Estates, Powers and Trusts Law §5-1.1(c) is the relevant statute

governing Petitioner's right to renounce her share under the instant Will and receive in lieu thereof the statutory "elective share" to which a surviving spouse is entitled. In particular, EPTL §5-1.1(c)(1)(F) states:

(F) Where an absolute testamentary provision is made for the surviving spouse of or in excess of ten thousand dollars, and also a provision in trust with income payable to such spouse for life of an amount equal to or greater than the difference between such absolute testamentary provision and his elective share, the surviving spouse has no right of election."

Therefore, aside from EPTL §5-3.1 (which gives by operation of law \$1,000 plus decedent's household items to his family), if the surviving spouse receives an absolute testamentary disposition of at least \$10,000 and is the life beneficiary of testamentary trusts of which the principal is equal to her elective share less the absolute testamentary dispositions to her, then the surviving spouse has no statutory right to obtain a share of the decedent's estate in excess of the amount bequeathed to her under decedent's Will. As the courts have stated, in order to preclude an election by a surviving spouse under EPTL 5-1.1, the provisions contained in the Will must equal a testamentary gift to the surviving spouse of a sum equal to the elective share (which usually equals the intestate share) or a gift in trust of such sum for the use of the surviving spouse for life, or a combination of such gifts providing in the aggregate of at least such a sum. In re Byrnes' Will, 260 N.Y. 465 (1933); In re Barton's Will, 126 N.Y.S. 2d 780 (Surr. Ct., Queens Cty. (1953)).

In addition, the New York Courts hold that a life estate in a trust consisting of improved realty is equivalent to a life estate in a trust fund

of money for purposes of EPTL §5-1.1. In re Minnelli's Will, 275 N.Y.S. 2d 224, 52 Misc. 2d 94 (Surr. Ct., Erie Cty. (1966).

It should be apparent, to anyone familiar with the New York Statute, that Petitioner had no right of election in the instant case. The net estate of decedent for purposes of the statute is \$1,187,218, being the adjusted gross estate in the amount of \$1,242,381 (A-139) less life insurance on decedent's life of \$55,163 (A-29). EPTL §5-1.1(c)(1)(B) states:

"(B) The elective share, as used in this paragraph, is one-third of the net estate if the decedent is survived by one or more issue and in all other cases, one-half of such net estate. In computing the net estate, debts, administration and reasonable funeral expenses shall be deducted but all estate taxes shall be disregarded, except that nothing contained herein relieves the surviving spouse from contributing to all such taxes the amounts apportioned against him under 2-1.8."

This Petitioner's elective share is one-half of the decedent's net estate, or \$593,609. Paragraph THIRD of the Will makes an absolute testamentary disposition to Petitioner in the amount of \$316,093, which the Commissioner allowed as the marital deduction. The net principal of the Trust created in Paragraph SEVENTH, of which Petitioner is sole income beneficiary during her lifetime, was \$502,234. The principal of the Trust created in Paragraph SIXTH, of which Petitioner is beneficiary of at least five-ninths (5/9ths) of the income during her lifetime, was \$237,000. Real estate makes up the principal of both of these Trusts. The principal of the Trust created in Paragraph EIGHTH, of which Petitioner is sole income beneficiary during her lifetime, was \$140,634.

In sum, Petitioner was the life income beneficiary of three Trusts with a combined prorated principal of \$1,233,773, which far exceeds

the difference between her elective share of \$593,609 and her absolute testamentary provisions of \$316,093. Therefore, Petitioner had no right of election against the Will under New York law, and it must be presumed that the remainderman knew that, although the Tax Court did not.

The error by the Tax Court on this point indicates its unfamiliarity with New York law and its failure to comprehend New York law relevant to the issues in question whose proper resolution depends upon such comprehension. EPTL §5-1.1 is a fundamental, often-applied provision of New York law, and by comparison to the equally important and common New York parol evidence rule, a relatively simple one. Yet the Court's interpretation and application of a widow's right to elect against the Will under New York law is so obviously wrong that it casts grave doubt on the accuracy of its understanding and application of the New York parol evidence rule on the facts of the instant case.

It bears repetition that the construction of a Will is most difficult for a Court and all relevant extrinsic evidence should be given proper consideration in connection thereto. In re Fabbri's Will, supra. Here, the Court made its task almost impossible by giving trifling consideration to the opinion of a party adverse to Mrs. Trunk as to the denotation of the pertinent paragraphs of the Will. This error committed by the Court requires reversal of its judgment and entitles Petitioner to a new trial.

H. The discretionary power vested in the surviving spouse to demand the bequest specified in paragraph SEVENTH of the Will qualifies as a marital bequest under Section 2056 (b) (5) of the Internal Revenue Code of 1954. Petitioner claims that to the extent of \$200,000.00, TRUST TWO

satisfies Internal Revenue Code §2056 (b) (5) as a bequest which qualifies for the marital deduction. The regulations at §20.2056(b) - 5(a) break down that section into five components each of which must be met for a marital bequest or any part thereof to be deducted from the gross estate:

- (1) The surviving spouse must be entitled for life to all of the income from the entire interest or a specific portion of the entire interest, or to a specific portion of all the income from the entire interest.
- (2) The income payable to the surviving spouse must be payable annually or at more frequent intervals.
- (3) The surviving spouse must have the power to appoint the entire interest or the specific portion to either herself or her estate.
- (4) The power in the surviving spouse must be exercisable by her alone and (whether exercisable by Will or during life) must be exercisable in all events.
- (5) The entire interest or the specific portion must not be subject to a power in any other person to appoint any part to any person other than the surviving spouse.

Condition (1) is met for Paragraph SEVENTH, provides that Petitioner is entitled to all of the income from the Trust, for her life.

Condition (2) is also met, for subparagraph (b) of Paragraph SEVENTH of the Will requires quarterly payments of all the income of the Trust.

Since Petitioner was given the power of appointing \$200,000 of the corpus of TRUST TWO to herself, thus qualifying her interest as a

general power of appointment under both EPTL 10-3.2(b) or I.R.C. §2041 (b) (1), the Trust also meets condition (3) set forth in the regulations.

Petitioner contends that condition (4) is met because the inter-vivos power vested in Petitioner was exercisable by her alone and in all events. It was Testator's intent under Paragraph SEVENTH regarding TRUST TWO to ensure his widow's right and, more importantly, ability to actually get the \$200,000 upon her demand. The fact that she needed the Trustee's cooperation related solely to the administration of the Trust and introduced only a formal limitation with respect to the use of the funds rather than her right to demand the money. L. O. Miller, Exr., et al. v. Dowling, 56-2 USTC 11646 (1956).

With respect to the "in all events" test, Regulation 20.2056 (b)-5 (g) (4) states: "Examples of formal limitations on a power exercisable during life are requirements that an exercise must be in a particular form, that it must be filed with a Trustee during the spouse's life, that reasonable notice must be given, or that reasonable intervals must elapse between successive partial exercises." That language plainly applies to the Trustee's function to determine if the \$200,000 was to be raised by borrowing, or by sale of the Trust property.

The power was, however, exercisable by Petitioner alone since the Trustee, a disinterested party, considered the widow's request to him as "mandatory", in accordance with the expressed intent of the Testator. Furthermore, all the interested parties, i.e., the contingent beneficiaries and the charitable remainderman, expressed by their signing of the agreement to settle the intermediate account of the Trustee a similar understanding of the widow's right to take the \$200,000 from TRUST TWO.

Viewed in its entirety, Paragraph SEVENTH was the Testator's attempt to ensure both an income to Mrs. Trunk from the Trust corpus and the ability of the Trustee to provide her with \$200,000 from such corpus.

The Testator directed that the sole property which would initially comprise the corpus of TRUST TWO be an office building in lower Manhattan. The Testator knew that the property was already subject to a substantial first mortgage. In order neither to jeopardize the income producing character of the Trust, should its only asset suffer in an adverse commercial real estate market, nor to cause the Trust undue hardship in satisfying his marital bequest of \$200,000 of Trust corpus, the Testator expressly permitted a further mortgage or a sale to fulfill his two-fold objective. The Court is undoubtedly aware of the general rule of trust adherence which would ordinarily restrain a Trustee in raising the sum of \$200,00 where the Trust property consists solely of real estate. If a Trustee wanted to borrow against the corpus or sell it, he would be required to get court approval for the loan or sale. Such approval is only to be granted upon notice and the consent of the contingent beneficiaries and remainderman, all of which would be time consuming and might never be accomplished. The intent of the decedent was to guarantee that the widow could appoint a specific sum of money to herself by the exercise of the power of appointment and therefore provide that no other person or entity -- neither the contingent beneficiaries, the remainderman, nor the Court -- needed to be consulted when the Trustee received the widow's demand for the money.

Lastly, the fifth condition stated in the Regulation requires that the portion of corpus for which the marital deduction is claimed not

be subject to power of appointment in any person other than the surviving spouse. This is complied with in Paragraph SEVENTH for the Trustee's prerogative to use the sums raised by borrowing money to pay Federal or New York State estate taxes could never become available unless and to the extent the widow declined to claim the entire \$200,000. Thus, it would be a meaningless act for the Trustee to borrow \$200,000 to pay taxes, without first having the widow waive her right to the \$200,000.

As thus constituted, the failure by the widow to claim such sums for herself would appear to be a power vested in her to use the money to pay estate taxes, since that is the only authorized use should she not claim her bequest. Such additional power vested in the surviving spouse in no way defeats or limits the power to appoint the property to herself. Rev. Rul. 72-154, 1972-1 CB 310; Reg. 20.2056 (b)-5(g)(5). Indeed, even if it were conceded that the residuary power of appointment resided in the Trustee to the extent that Mrs. Trunk might have been relieved in her capacity as Executrix from primary liability for Federal estate taxes under IRC §2002, it would not be that the Trustee was exercising a power in opposition to the surviving spouse as required by Reg. 20.2056 (b) -(5) (j). In any event, Petitioner alone had the initiative with respect to all sums raised by borrowing and any other purported power exercisable by the Trustee could become exercisable only after and to the extent the widow allowed her power to lapse.

In sum, decedent's bequest to his widow out of the corpus of TRUST TWO under Paragraph SEVENTH was contingent neither in its availability or amount. It did depend upon her exercise of the right to claim the \$200,000 for herself but that is the essence of all powers of appointment. Accordingly, the sum of \$200,000 should be allowed as a marital deduction.

POINT II

THE DIRECTIONS IN THE WILL TO PAY TRUST
ONE AND TRUST TWO PRO RATA SHARE OF ESTATE
TAX OUT OF TRUST PRINCIPAL IS VALID AND
MUST BE FOLLOWED UNDER NEW YORK LAW

The Court requested that the issue of the apportionment of estate taxes between the remainder interests and the life interests of TRUST ONE and TRUST TWO, created in Paragraphs SIXTH and SEVENTH of the Will, respectively, be argued only on brief. The Court properly noted that the apportionment of estate taxes is governed by State law, which in this case is New York Estates, Power, and Trusts Law §2-1.8.* However, Petitioner contends that the Court materially erred in its interpretation of the Will and in its application of the appropriate State law. Therefore, the determination of the Tax Court should be reversed.

It is the settled law in New York that pursuant to EPTL §2-1.8 there will be an apportionment of Federal and State estate taxes in accordance with the formula therein prescribed, unless there is a clearly expressed intention to the contrary in the Will. In re Pepper's Estate, 307 N.Y. 242, 120 N.E. 2d 807 (1954). In general terms, the statute divides the estate tax liability among the beneficiaries of decedent's estate (including nontestamentary beneficiaries) in proportion to the contribution to the taxable estate made by each beneficiary's legacy. For example, a charity which receives an absolute bequest, will not be apportioned any estate tax liability, and a surviving spouse will not be apportioned any estate tax liability, and a surviving spouse will not be apportioned any estate tax liability to the extent that her legacy is deductible from decedent's gross estate in computing his taxable estate.

*Relevant sections of the law appear in Addendum at pp. 51-52.

any estate tax liability to the extent that her legacy is deductible from decedent's gross estate in computing his taxable estate.

For testamentary trusts, EPTL §2-1.8 (b) states the special rule for apportionment of estate taxes that the estate taxes are to be paid out of the trust principal without apportionment between the life beneficiaries and remainderman, unless the Will contains a clear and unambiguous direction to the contrary. In re Pepper's Estate, supra. This rule applies even if the remainderman is a charity. In re Hewlett's Will, 352 N.Y.S. 2d 406, 77 Misc. 2d 38 (Surr. Ct., Nassau Cty. 1974). EPTL §2-1.8 (b) states in full:

"Unless otherwise provided, when a disposition is made by which any person is given an interest in income or an estate for years or for life or other temporary interest in any property or fund, the tax apportionable against such temporary interest and the remainder limited thereon is chargeable against and payable out of the principal of such property or fund without apportionment between such temporary interest and remainder. The provisions of this paragraph apply although the holder of the temporary interest has rights in the principal, but do not apply to a common law annuity."

In order for the directions of a testator, rather than those of EPTL 2-1.8, to determine the apportionment of estate taxes among the beneficiaries of his estate, the language of his Will must meet the test laid down in In re Pepper's Estate, supra. The language must be "clear and unambiguous" to apportion estate taxes in a manner contrary to the statute or to except bequests entirely from their statutory liability. However, the phrase "clear and unambiguous" does not mean the language of the Will must be precise and certain in its directions. In re Chodikoff's Will, 50 Misc. 2d 86, 270 N.Y.S. 2d 175 (Surr. Ct., Rens. Cty. 1966). Just as in other matters concerning the construction of a Will, if the intent of the Testator is clear and unambiguous, then that intent must be

given effect, albeit the testator did not chose precise language or a strict application of formal cannons of construction might defeat the clear intent of the testator. In re Chodikoff's Will, supra; Matter of Buechner, 226 N.Y. 440, 123 N.E. 741 (1919).

In the Chodikoff case, decedent's Will contained a separate article directing that certain bequests be exonerated from liability from their proportionate share of the estate taxes. The issue before the Court was whether the nontestamentary gifts and the other nonresiduary bequests of decedent's Will and Codicil were also to be excepted from the statutory apportionment rules of the EPTL §2-1.8 by the above mentioned separate article in decedent's Will, despite the fact that the language, as such, of the article of the Will did not literally so direct and formal cannons of construction would require them to share in the payment of estate taxes. The Court held that however imprecise and inartful the literal language of the Will may be, it was sufficient under the mandate of In re Pepper's Estate, supra, that the Will merely contained a clear and unambiguous intention with respect to the nonresiduary bequests, in order to override the statutory apportionment formula. Moreover, the Court was disposed to accept extrinsic evidence to determine the requisite intention. In the end, the Court held that the separate article of decedent's Will was sufficiently clear and unambiguous to except all the nontestamentary gifts and nonresiduary bequests not listed in that separate articule from the estate tax apportionment rules of EPTL §2-1.8.

Decedent's Will does not contain a separate article directing

how the estate tax burden is to be apportioned among all the beneficiaries of the estate. However, each of Paragraphs SIXTH and SEVENTH direct the Trustee to collect the income generated by the trust corpus "...and apply and pay over said income as follows:

(a) To the payment and discharge of any and all liabilities and obligations arising out of or connected with the operation and maintenance of the Trust property including, but not limited to, the payment of interest and amortization of mortgages, the discharge and satisfaction of mortgages, the payment of taxes and water charges, if any, as well as the payment of administration, legal expenses and Federal and State Estate Taxes and Income Taxes."

Thereafter, both Paragraphs SIXTH and SEVENTH direct the Trustee to pay the income remaining after having discharged the liabilities specified in subparagraphs (a) above to the beneficiaries. Paragraph SIXTH states in pertinent part immediately following subparagraph (a) above:

"(b) To the payment out of the remaining net income of the following amounts to the following named persons:..."

Paragraph SEVENTH states in pertinent part, immediately following subparagraph (a) above:

"(b) To the payment quarter-annually to my wife, CLARA POEY TRUNK, of all of my share of net income..."
(Underscoring Supplied)

The statutory formula for apportionment of estate taxes

only applies "Unless otherwise provided", such as by the valid directions contained in Mr. Trunk's Will. Petitioner contends that decedent's Will contains clear and unambiguous directions to apportion the estate taxes attribute to Trust ONE and Trust TWO among the life interests and remainder interests thereof. Since these directions to apportion the estate taxes satisfy the requirements of In re Pepper's Estate, supra, they must be given effect in place of statutory apportionment formula of §2-1.8(b).

It is obvious that in subparagraph (a) of paragraphs "Sixth" and "Seventh", decedent directed the trustees of Trust ONE and Trust TWO respectively to use the trust income to pay the trusts' estate taxes prior to paying out such income for any other purpose. The language of the Will explicitly states that the trustees of Trust ONE and Trust TWO shall apply the income of the respective trust to the payment of Federal and State Estate Taxes. This is the first direction to the trustees for the use of the trust income. Moreover, the decedent's direction as to the estate taxes are included in the same sentence with his directions as to payment of all the ordinary administration expenses. This shows decedent's intention to treat estate taxes like administration expenses, that is, to pay them out of trust income, not trust principal. To be even more clear, decedent used the language "remaining net income" in paragraph "Sixth" and "net income" in paragraph "Seventh" in directing the respective Trustees to pay the life income beneficiaries their shares of trust income. This discloses decedent's intention that the life interests were to bear the burden of paying the estate taxes

attributed to their respective Trust. Nowhere does decedent direct the Trustees to make concurrent distributions from principal to the life beneficiaries to offset the estate tax payments. Indeed, in light of the fact that the principal of each of the Trusts in question consisted of a single parcel of real estate, it would have been difficult to make such distributions from principal.

For the above reasons, it is apparent that the Will contained a clear and unambiguous direction regarding the apportionment of the respective estate taxes charged against TRUST ONE and TRUST TWO between the remainder interests and life interests thereof. The intention of decedent is clear and unambiguous that the life interests must bear the entire estate tax burden apportioned to their Trust under the general rules of EPTL §2-1.8 (a); and to the contrary of the special rule of EPTL §2-1.8 (b).

However, the Tax Court applied an irrationally literal magnifying glass to the words of the Will. The New York Courts have cautioned against such an approach to the instant issue. In re Fabbri's Will, supra. The Court did not search for decedent's intention as expressed in the Will, but rather used semantic arguments and questionable canons of construction with a vindictiveness to thwart that intention. It seems the Court was looking for trouble where none was apparent. In order to find an ambiguity in the directions contained in each paragraph for the payment of estate taxes attributable to each Trust's corpus, the Court, without any suggestion from the parties, looked to the language of Paragraph EIGHTH which expressed directions for the payment of estate

taxes attributable to that paragraph's Trust. But the Trust created by Paragraph EIGHTH contained a type of property (a contract) entirely different from that of Paragraphs SIXTH and SEVENTH, (real estate) and accordingly utilized technical language which differed from that used in Paragraphs SIXTH and SEVENTH to describe the disposition of the Trust income and the administration including the payment of estate taxes of the Trust. This analysis by the Court is akin to comparing apples to oranges. It is no wonder the Court became confused as to the meaning of the Will's words and the decedent's intent expressed in Paragraphs SIXTH and SEVENTH of the Will.

Moreover, it appears from reading the opinion of the Tax Court, that the Court required precision and certainty of language in order for decedent's directive to override EPTL §2-1.8. Surely that is incorrect under the Pepper and Chodikoff cases which do not erect such a rigid fortress to protect the statutory apportionment rule from a testator's directions concerning the payment of his estate's taxes. Finally, the reasoning of the Court is obscure. It determined that decedent clearly directed the Trustees to satisfy the tax liability with the Trust's income funds. Yet the Court decided that the Will did not express a tax apportionment formula to the contrary of that in EPTL §2-1.8 (b), even though the Court fails to point out how the life interests are supposed to be reimbursed, and despite the fact that under the explicit terms of TRUST ONE and TRUST TWO the life interests were only entitled to the income remaining after the payment of the liabilities enumerated in subparagraph (a) of Paragraphs SIXTH and SEVENTH, including the estate taxes.

The errors with respect to the actual application of New York law to the instant facts, create an almost insurmountable barrier for a testator's directions to fit into the "unless otherwise provided" language of EPTL §2-1.8 (b). This was never intended to be the case, as EPTL §2-1.8 (b) only applies where a testator has neglected to consider the estate tax consequences of his bequests. The primary purpose of EPTL §2-1.8 was to reverse the rule of casting the entire estate tax burden on the residuary legatees. In re Rappaport's Estate, 167 Misc. 164, 3 N.Y.S. 2d 616 (1938). In re Richheimer's Estate, 200 Misc. 345, 102 N.Y.S. 2d 750 (1951). Since the testator's directions in question do not conflict in that goal, there is no reason to view unfavorably, as the Court did, the validity of such directions. The error with respect to the interpretation of the Will is surely material, as it subverts the expressed intention of the testator to give the life beneficiaries shares of "net income", which the language of the Will shows means income remaining after payment of administration expenses, including estate taxes. These errors committed by the Court require that its judgment be reversed.

CONCLUSION

For the aforesaid reasons, the decision of the Tax Court should be reversed.

Respectfully submitted,

Jerome Kamerman
Attorney for Petitioner-Appellant

ADDENDUM

BEQUESTS, ETC., TO SURVIVING SPOUSE

I.R.C. Sec. 2056

(a) Allowance of Marital Deduction. For purposes of the tax imposed by Section 2001, the value of the taxable estate shall, except as limited by subsections (b), (c) and (d), be determined by deducting from the value of the gross estate an amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

(b) Limitation in the Case of Life Estate or Other Terminable Interest.

(1) General Rule. Where, on the lapse of time, on the occurrence of an event of contingency, or on the failure of an event or contingency to occur, an interest passing to the surviving spouse will terminate or fail, no deduction shall be allowed under this section with respect to such interest:

(A) if an interest in such property passes or has passed (for less than an adequate and full consideration in money or money's worth) from the decedent to any person other than such surviving spouse (or the estate of such spouse); and

(B) if by reason of such passing such person (or his heirs or assigns) may possess or enjoy any part of such property after such termination or failure of the interest so passing to the surviving spouse; and no deduction shall be allowed with respect to such interest (even if such deduction is not disallowed under subparagraphs (A) and (B)). -

(C) if such interest is to be acquired for the surviving spouse, pursuant to directions of the decedent, by his executor or by the Trustee of a Trust.

For purposes of this paragraph, an interest shall not be considered as an interest which will terminate or fail merely because it is the ownership of a bond, note, or similar contractual obligation, the discharge of which would not have the effect of an annuity for life or for a term.

(2) Interest in Unidentified Assets. Where the assets (included in the decedent's gross estate) out of which, or the proceeds of which, an interest passing to the surviving spouse may be satisfied include a particular asset or assets with respect to which no deduction would be allowed if such asset or assets passed from the decedent to such spouse, then the value of such interest passing to such spouse shall, for purposes of subsection (a), be reduced by the aggregate value of such particular assets.

(3) Interest of Spouse Conditional on Survival For Limited Period. For purposes of this subsection, an interest passing to the surviving spouse shall not be considered as an interest which will terminate or fail on the death of such spouse if:

(A) such death will cause a termination or failure of such interest only if it occurs within a period not exceeding 6 months after the decedent's death, or only if it occurs as a result of a common disaster resulting in the death of the decedent and the surviving spouse, or only if it occurs in the case of either such event; and

(B) such termination or failure does not in fact occur.

(4) Valuation of Interest Passing to Surviving Spouse. In determining for purposes of subsection (a) the value of any interest in property passing to the surviving spouse for which a deduction is allowed by this section:

(A) there shall be taken into account the effect which the tax imposed by Section 2001, or any estate, succession, legacy, or inheritance tax, has on the net value to the surviving spouse of such interest; and

(B) where such interest or property is encumbered in any manner, or where the surviving spouse incurs any obligation imposed by the decedent with respect to the passing of such interest, such encumbrance or obligation shall be taken into account in the same manner as if the amount of a gift to such spouse of such interest were being determined.

(5) Life Estate With Power of Appointment in Surviving Spouse. In the case of an interest in property passing from the decedent, if his surviving spouse is entitled for life to all the income from the entire interest, or all the income from a specific

portion thereof, payable annually or at more frequent intervals, with power in the surviving spouse to appoint the entire interest, or such specific portion (exercisable in favor of such surviving spouse, or of the estate of such surviving spouse, or in favor of either, whether or not in each case the power is exercisable in favor of others), and with no power in any other person to appoint any part of the interest, or such specific portion, to any person other than the surviving spouse:

(A) the interest or such portion thereof so passing shall, for purposes of subsection (a), be considered as passing to the surviving spouse; and

(B) no part of the interest so passing shall, for purposes of paragraph (1) (A), be considered as passing to any person other than the surviving spouse.

This paragraph shall apply only if such power in the surviving spouse to appoint the entire interest, or such specific portion thereof, whether exercisable by will or during life, is exercisable by such spouse alone and in all events.

(6) Life Insurance or Annuity Payments with Power of Appointment in Surviving Spouse. In the case of an interest in property passing from the decedent consisting of proceeds under a life insurance, endowment, or annuity contract, if under the terms of the contract such proceeds are payable in installments or are held by the insurer subject to an agreement to pay interest thereon (whether the proceeds, on the termination of any interest payments, are payable in a lump sum or in annual or more frequent installments), and such installment or interest payments are payable annually or at more frequent intervals, commencing not later than 13 months after the decedent's death, and all amounts, or a specific portion of all such amounts, payable during the life of the surviving spouse are payable only to such spouse, and such spouse has the power to appoint all amounts, or such specific portion, payable under such contract (exercisable in favor of such surviving spouse, or of the estate of such surviving spouse, or in favor of either, whether or not in each case the power is exercisable in favor of others), with no power in any other person to appoint such amounts to any person other than the surviving spouse:

(A) such amounts shall, for purposes of subsection (a), be considered as passing to the surviving spouse; and

(B) no part of such amounts shall, for purposes of paragraph (1) (A), be considered as passing to any person other than the surviving spouse.

This paragraph shall apply only if, under the terms of the contract, such power in the surviving spouse to appoint such amounts, whether exercisable by will or during life, is exercisable by such spouse alone and in all events.

* * *

(e) Definition. For purposes of this section, an interest in property shall be considered as passing from the decedent to any person if and only if:

- (1) such interest is bequeathed or devised to such person by the decedent;
- (2) such interest is inherited by such person from the decedent;
- (3) such interest is the dower or courtesy interest (or statutory interest in lieu thereof) of such person as surviving spouse of the decedent;
- (4) such interest has been transferred to such person by the decedent at any time;
- (5) such interest was, at the time of the decedent's death, held by such person and the decedent (or by them and any other person) in joint ownership with right of survivorship;
- (6) the decedent had a power (either alone or in conjunction with any person) to appoint such interest and if he appoints or has appointed such interest to such person, or if such person takes such interest in default on the release or nonexercise of such power; or
- (7) such interest consists of proceeds of insurance on the life of the decedent receivable by such person.

Except as provided in paragraph (5) or (6) of subsection (b), where at the time of the decedent's death it is not possible to ascertain the particular person or persons to whom an interest in property may pass from the decedent, such interest shall, for purposes of subparagraphs (A) and (B) of subsection (b) (1), be considered as passing from the decedent to a person other than the surviving spouse.

N. Y. ESTATES, POWERS AND TRUSTS LAW

Sec. 2-1.8

Apportionment of Federal and State Estate or Other Death Taxes; Fiduciary to Collect Taxes From Property Taxed and Transferees Thereof.

(a) Whenever it appears in any appropriate action or proceeding that a fiduciary has paid or may be required to pay an estate or other death tax, under the law of this state or of any other jurisdiction, with respect to any property required to be included in the gross tax estate of a decedent under the provisions of any such law (hereinafter called "the tax"), the amount of the tax, except in a case where a testator otherwise directs in his will, and except where by any instrument other than a will (hereinafter called a "non-testamentary instrument") direction is given for apportionment within the fund of taxes assessed upon the specific fund dealt with in such non-testamentary instrument, shall be equitably apportioned among the persons interested in the gross tax estate, whether residents or non-residents of this state, to whom such property is disposed of or to whom any benefit therein accrues (hereinafter called "the persons benefited") in accordance with the rules of apportionment herein set forth, and the persons benefited shall contribute the amounts apportioned against them.

(b) Unless otherwise provided, when a disposition is made by which any person is given an interest in income or an estate for years or for life or other temporary interest in any property or fund, the tax apportionable against such temporary interest and the remainder limited thereon is chargeable against and payable out of the principal of such property or fund without apportionment between such temporary interest and remainder. The provisions of this paragraph apply although the holder of the temporary interest has rights in the principal, but do not apply to a common law annuity.

(c) Unless otherwise provided in the will or non-testamentary instruments:

(1) The tax shall be apportioned among the persons benefited in the proportion that the value of the property or interest received by each such person benefited bears to the total value of the property and interest received by all persons benefited, the values as finally determined in the respective tax proceedings being the values to be used as the basis for apportionment of the respective taxes.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket
Index No. 76-4125

ESTATE OF ANTON L. TRUNK, Deceased,
Clara P. Trunk, Executrix, Petitioner-
Appellant, ^{Plaintiff}
against ^{Defendant}
COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee. ^{Defendant}

AFFIDAVIT OF SERVICE
BY MAIL

STATE OF NEW YORK, COUNTY OF NEW YORK

ss.:

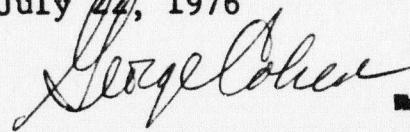
The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at 101 West 80th Street,
New York, New York 10024

That on July 22, 1976 deponent served the annexed Brief for
Petitioner-Appellant
on / Daniel Ross, Esq. Appellate Section of Tax Division, U.S. Dept. of
attorney(s) for Justice ¹⁹⁷⁶ Respondent-Appellee
in this action at Constitution Ave. betw. 9th & 10th Sts., Washington D.C. 20530
the address designated by said attorney(s) for that purpose by depositing 3 true copy of same enclosed
in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care
and custody of the United States Postal Service within the State of New York.

Sworn to before me

July 22, 1976



GEORGE COHEN
Public, State of New
No. 31-0682100
Qualified in New York County
Commission Expires March 30, 1977

The name signed must be printed beneath

August De Fonse

